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Via email and U.S. mail

Jeanine Townsend
Clerk to the Board
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: Butte County's Comments on the Matter of Water Quality Certification for the Department of Water Resources Oroville Facilities (Federal Energy Regulatory Commission Project No. 2100)

Dear Ms. Townsend:

This letter provides Butte County's (Butte's) comments on the State Water Resources Control Board's December 3, 2010 draft water quality certification ("July 2010 draft certification"), the fourth public draft addressing the Department of Water Resources' (DWR's) application to the Federal Energy Regulatory Commission (FERC) for a new license to operate the Oroville Facilities ("Oroville project," FERC Project 2100).

Consistent with the Board's instructions, this letter focuses only on the current draft's changes from the Board's third public draft, which would revise one of the proposed conditions of certification (S9). The great majority of Butte's comments on earlier drafts, particularly the third, remain relevant to the present draft. Butte's September 28, 2010 comments addressed the third draft. Exhibits to that comment letter provided Butte's comments on the first and second drafts (respectively dated July 29, 2009 and February 16, 2010), and documents illuminating the need for the Board's action to account for climate change and changes in State Water Project operations. Butte requests that Board members review these earlier submissions in preparation for the December 15, 2010 meeting

Butte has reviewed the four "options" in the new version of Condition S9 in light of the Board's own well-founded concern that "[b]eneficial uses currently impacted by the project may not be reasonably protected if the proposed measure has a management plan with unclear or unenforceable standards, an excessively long period prior to implementation, or unspecified implementation dates."

(Draft certification, p. 4.)

Butte strongly opposes attempts by DWR and the State Water Contractors organization (SWC) to question the Board's authority and to weaken the State Board's conditions of certification, including Condition S9. As the Board correctly noted in its July 9, 2010 Response to Comments (RTC), "such enforceability is necessary for the actions upon which the State Water Board must rely upon to make a finding that the project will meet water quality standards." RTC, p. 11. Nor is the Board "bound by legal conclusions regarding beneficial use protection in the EIR" when asserting its own enforcement authority. *Id.*

However, these relentless attempts to deprive the Board of its authority and weaken water quality certification conditions are instructive, because these efforts are likely to continue long after the Board issues final conditions. Before the Board takes final actions on certification for Oroville, the Board must ensure that it has done everything necessary to ensure that the conditions are sufficiently robust and resilient to protect beneficial uses and water quality for the 30 to 50-year period of the license term.

The Board must continue to resist pressure to weaken Condition S9 and other conditions of approval; it should instead clarify and reinforce the conditions as Butte and others have proposed. As the Board understands, it is responsible "to ensure that the impacts for loss of upstream habitat are appropriately mitigated and that the project protects beneficial uses. RTC, p. 11 (citing *Lake Erie Alliance for the Protection of the Coastal Corridor* (W.D. Penn. 1981) 526 F.Supp. 1063, 1074, *affd.* mem. (3d Cir. 1983) 725 F.2d 668, cert. den. (1983) 464 U.S. 916. ["state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government"]; State Water Board Order WR 2002-0002, at pp. 11-12; State Water Board Order WR 2008-0025, at pp. 18-22).

Of the four options listed for Condition S9, Butte is particularly concerned about Option 4, which would merely reserve authority for the Deputy Director to act if the Habitat Expansion Agreement (HEA) is not implemented by some unspecified date. This virtual abdication of authority would not adequately protect water quality. As the Board correctly explained in its response to comments:

A reservation of authority is not sufficient to fulfill the State Water Board's responsibilities to ensure that water quality standards are met. For the reasons discussed above in the section regarding the State Water Board's enforcement authority, the Board cannot rely on the third-party contractual agreement of the HEA to address impacts caused by blockage of fish passage. A reservation of authority to address the issue later is not sufficient to provide reasonable assurance that the beneficial uses will be protected, and cannot cure the problems inherent in relying on third parties to address water quality issues before the State Water Board.

RTC, p. 12. Moreover, in light of the repeated attempts in years of proceedings before the Board to weaken the certification conditions, the Board can anticipate that DWR and SWC are likely to do everything possible to delay or evade the Board's authority should it act on the reserved power in the future. The Board's authority must be clarified before certification becomes final, rather than years in the future if at all.

Of the options presented for Condition S9, Option 3 comes closest to meeting the Board's own aspiration and duty to provide clear, enforceable standards. It would minimize potential harm by requiring the license to complete its required action within one year (rather than two, as in Options 1 and 2). More fundamentally, it appears to provide the Board more robust oversight in the development and evaluation of the plan. It also appropriately reserves authority to the Deputy Director in the event plan goals are not met in the prescribed timeline, or fish passage is required. However, the condition's reference to the Deputy Director's authority to "modify" the condition is insufficiently specific. It should be more clearly tied to the need to mitigate the harm caused by the project's operation. The condition should also more clearly articulate the measurement of compliance, the timeline of compliance, and the consequence if the condition's requirements are not met.

In sum, the State Board should not grant DWR its requested certification unless and until it can ensure the protection of water quality and beneficial uses over the full term of the license. Should the Board choose to move forward with certification, the proposed conditions should not be weakened, and Butte's further suggestions outlined here and in its other comment letters should be incorporated.

Respectfully submitted,

Roger B. Moore
Counsel to Butte County